LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5246

WALTER JOHNSON,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE GOLD
District Attorney Kings County
400 Municipal Building
Brooklyn, New York 11201

J. MITCHELL ROSENBERG
Assistant District Attorney
of Counsel

INDEX

	PAGE
Statement	1
Jurisdiction	2
Statement of Case	2
POINT I—Section 1899 of the New York State Penal Law is constitutional since based on life's experiences there is a rational connection between the fact proved and the ultimate fact presumed	4
RESPONDENT'S APPENDIX A	
Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York	21

AUTHORITIES CITED

Cases:

Anthony v. New York, 379 U.S. 983	5
Bozza v. United States, 330 U.S. 160	15
Leary v. United States, 395 U.S. 6	15
Manley v. Georgia, 279 U.S. 1	20
People v. Anthony, 21 A.D. 2d 666	5
People v. Gerchinsky, 281 N.Y. 581	5, 6
People v. McCaleb, 25 N.Y. 2d 394	9, 17
People v. Moro, 23 N Y 2d 496	18
People v. Murphy et al., 276 N.Y. 612	8
People v. Russo, 303 N.Y. 673	6, 8
People v. Terra, 303 N. Y. 332	6, 7, 10, 11, 13 passim
Tot v. United States, 319 U.S. 463	12, 15
Turner v. United States, 396 U.S. 398	16

PAGE

United States ex rel. Murphy v. Warden Clinton Prison, 29 F.S. 486 8

United States v. Gainey, 380 U.S. 63 ..... 13, 15

United States v. Romano, 382 U.S. 136 15

Wangrow v. United States, 399 F. 2d 106, cert. den. 393 U.S. 933 ..... 18, 19

Statutes and Rules

Section 1899 New York State Penal Law .2, 4, 5, 7, 10 passim

Section 1898-a New York State Penal Law 4, 5, 6

Section 165.05 subdivision 1, New York State Penal Law 9

Section 165.15 subdivision 3, New York State Penal Law 12

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-5246

WALTER JOHNSON,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of *certiorari* to review a judgment of the Court of Appeals of the State of New York, entered on January 13, 1971, unanimously affirming a judgment of the Appellate Division, Second Department, entered on March 13, 1970, which also unanimously affirmed a judgment of the Supreme Court of the State of New York, County of Kings rendered on March 5, 1968. The judgment of the Court of Appeals, without opinion, is reported in 28 N.Y. 2d 540 (1971).* The judgment of the Appellate Division, without opinion, is reported in 34 A.D. 2d 616 (1970).

---

* Appendix A.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). It is contended that petitioner's rights were violated by the application of section 1899(3) of the New York State Penal Law, creating a statutory presumption of the possession, by all the persons occupying an automobile, of a firearm at the time it is found in an automobile other than stolen or a public omnibus (excepting in three enumerated instances not applicable to the facts of this case). Specifically, appellant contends that his rights were abridged because he was denied the right to remain silent, the right to trial by jury, the right to trial "free from legislative interference" and the right to be found guilty but only beyond a reasonable doubt. Respondents' reply is that the presumption statute is valid and that based on life's experiences a rational connection exists between the fact proved and the ultimate fact presumed.

Statement of Case

Petitioner was convicted, after trial by jury, in the Supreme Court of the State of New York, County of Kings, of the crimes of unlawful possession as a felony of two dangerous weapons, namely, a revolver and a pistol and was sentenced to serve concurrent terms of three-and-one-half to fourteen years in Sing Sing Prison. Appellant had been indicted for the possession of weapons and dangerous instruments and appliances as a felony while acting in concert with two co-defendants, Thomas Mungo and Robert D'Ambra.

On October 18, 1967 a motion to suppress the evidence came on for a hearing before Judge Julius Helfand, an acting Supreme Court judge. On January 23, 1968 the trial was commenced before Honorable Vincent D. Damiani, a Supreme Court judge, and a jury.*

PATROLMAN EDWARD OBROWSKI testified that on January 14, 1967 at about 9:50 A.M.** he received a telephone communication over the radio of his patrol car to the effect that the three perpetrators who had hijacked a U.S.P. truck were seen leaving in a 1966 blue Plymouth, bearing registration number 6Z7514. According to the alarm, the truck was left near 71st Street and Fort Hamilton Parkway. Shortly thereafter, while in the area of West 11th Street and Avenue W, he noticed a 1966 powder blue Plymouth sedan bearing registration number 6Z7154, containing three occupants, and he followed the car to Avenue U and West 8th Street. The occupants were ordered out of the automobile and placed under arrest in the belief that they were the hijackers of the U.P.S. truck (H 3-4, 5-8, 16, T 16, 100). He frisked appellant and his two co-defendants, who were the occupants of the car, and also searched the car. Underneath the seat of Mungo, the driver, was a .22 calibre 8-shot fully loaded revolver and under the passenger seat, where appellant was

---

* We are consolidating the facts relevant to the petition adduced both on the hearing and at the trial and indicating the former by "H", and the latter by "T."

** It would appear from the testimony that the officer had received an earlier telephonic communication at 9:30 A.M., merely reciting the fact of the hijacking of a truck (H 4). In the police officer's testimony, however, the two messages of 9:30 and 9:50 A.M., are somewhat telescoped one into the other.

seated to the right of the driver, was a .32 calibre fully loaded automatic 8-shot (H 9-10, 15).

Sergeant Eugene Linane testified that he was together with Officer Obrowski when appellant and his co-defendants were arrested and he saw the guns—an automatic pistol and a revolver—removed from their car by Obrowski (T 93, 97).

Harry Brunner, manager of the Neptune Avenue Station of Alexander's-Rent-A-Car, testified that according to his records the automobile in question was rented from his company on January 12, 1967 and continued on rent on the 13th, 14th and 15th.* On the 16th, notification was received by his station that the customer had been arrested and that the car was impounded at a police station (T 102).

POINT I

Section 1899 of the New York State Penal Law is constitutional since based on life's experiences there is a rational connection between the fact proved and the ultimate fact presumed.

Appellant is seeking in effect to have this Court declare section 1899 of the New York Penal Law governing this case unconstitutional.** With exceptions not relevant to the issues of this case, section 1899 replaced the subject matter of section 1898(a) of the Penal Law which was repealed by the Laws of 1963. Any pronouncements therefore by the Court of Appeals of the State of New York

---

* At the police staton the co-defendant D'Ambra exhibited a receipt in his name for the car in question, indicating that it was rented from Alexander's Rent-A-Car (T 34-35).

** Section 1899 governing this case has since been replaced by section 265.15.

on the constitutionality of the repealed section 1898(a), or any action by the Supreme Court of the United States governing that section, is applicable to section 1899 which replaced it.

Preliminarily, we wish to state that the identical issue involved in this case was presented to this Court in *Anthony* v. *New York*, 379 U.S. 983 (1965) in which it denied a writ of *certiorari* to the Court of Appeals, New York. In *People* v. *Anthony*, 21 A.D. 666 (2d Div., 1964), the Appellate Division sustained a conviction involving the use of a presumption under section 1898(a) of the Penal Law. As indicated, this Court denied a writ of *certiorari*.

The Court of Appeals has declared in no uncertain terms in several cases that section 1898-a of the Penal Law is constitutional. Thus, in *People* v. *Gerchinsky*, 281 N.Y. 581 (1939), the three defendants were riding in an automobile with a loaded revolver on the floor under the rear seat. At the police station a further search disclosed another revolver in the back of the front cushion of the automobile near the driver's seat. There was also testimony that two cartridges adaptable to either one of the revolvers were found on the person of one of the defendants. The Court was confronted with the constitutionality of section 1898-a of the Penal Law then in force and which provided that "the presence in an automobile other than a public omnibus of any . . . pistol . . . shall be presumptive evidence of its illegal possession by all the persons found in such automobile at the time such weapon . . . is found." The Court of Appeals sustained the conviction, without opinion, as to each one of the three defendants. In the *Gerchinsky* case a

loaded revolver was found on the floor of the car and in the instant case two loaded revolvers were found on the floor of the car. Excepting that in *Gerchinsky* some shells were found on the person of one of the defendants, the case is no different from the instant case and it is not a distinguishing feature since the conviction was affirmed not only with respect to the defendant upon whose person cartridges were found but also with respect to the other two defendants on whose persons no cartridges were found.

The Court of Appeals was again confronted with section 1898-a of the Penal Law in *People* v. *Russo*, 303 N.Y. 673 (1951), and in a *Per Curiam* opinion it explicitly stated "[T]his Court has already declared section 1898-a of the Penal Law to be constitutional (*People* v. *Gerchinsky*, 281 N.Y. 581; see too *People* v. *Terra*, 303 N.Y. 332, decided herewith)." In that case, the police officers ordered the occupants out of an automobile and found on the rear shelf a loaded revolver. An officer testified that the appellant Russo told him he had known the gun was in the automobile. The fact that Russo made an admission regarding his knowledge of the presence of a gun in the automobile is no distinguishing feature of legal consequence from the instant case, since the Court of Appeals in that case declared section 1898-a of the Penal Law to be constitutional and that section obviously has no requirement that the presumption it creates is dependent upon a confession.

Although dealing with another subdivision of section 1899 of the Penal Law but which casts light upon this issue, *People* v. *Terra*, 303 N.Y. 332 (1951), (app. dsmd. 342 U.S. 938 "for the want of a substantial Federal question") in-

volved a presumption created by the old section 1897, subd. 1a, of the Penal Law, repealed by the Laws of 1963 and replaced by section 1899 of the Penal Law, namely, the presumption attaching to every one present in a room or vehicle in which a machine gun is found. In the *Terra* case a machine gun and ammunition for it were found in a one-room store occupied "or so the jury could have concluded" by the two defendants in connection with their business of pin ball machines. There were no extraneous facts, such as an admission by a defendant or the finding of any ammunition on the person of one of the defendants, and the Court upheld the constitutionality of the presumption created by subdivision 1-a of section 1897 of the Penal Law. The Court in declaring the section constitutional made the following cogent remarks:

> The statute here challenged visits no oppressive burden upon an accused. It gives him every opportunity to rebut the presumption—for which, as we have seen, there is fair and reasonable basis—merely calling upon him to explain the highly sinister and suspicious proof that a death-dealing machine gun was found in a room occupied by him. And, even if he offers no explanation, the jury may still refuse to convict. The burden of proof upon the entire case, the duty of establishing guilt beyond a reasonable doubt, remains as ever with the prosecution. Defendant's right to a fair trial continues undiminished; no hardship is imposed, no constitutional right or safeguard impaired.

303 N.Y. at 337. The court, further, in discussing the fact that presumptions are "no innovation in the field of criminal law," cited a host of U.S. Supreme Court and New York Court of Appeals cases which have held that the

"validity of a presumption statute, the permissibility of the presumption created, depend . . . upon whether, based on life and life's experiences, a rational connection between the fact proved and the ultimate fact presumed may be said to exist." *Ibid.*, 335. It concluded that there was such a rational connection in the instance of the presumption regarding a machine gun, and then made reference to its reaffirmance that day of the constitutionality of section 1898-a of the Penal Law in *People* v. *Russo, supra.* The Court continued:

> . . . If such statutes are constitutional—one presuming knowledge of a still from possession of perhaps a large area of land and the other presuming possession of a gun from *mere presence* in an automobile—then, a fortiori, a provision declaring possession of a gun inferable from occupancy of the room where it is found, is reasonable and valid. 303 N.Y. at 336 (Emphasis supplied).

The reference by the Court to "mere presence" of a gun in an automobile is indeed significant and we shall subsequently elaborate on this aspect.*

---

* An even stronger indication, if there need be, that the mere presence of a firearm in a room or vehicle can create a presumption and that there is no requirement, as contended by appellant, of forging additional links in the testimony in order to convict a defendant is presented by the case of *People* v. *Murphy et al.*, 276 N.Y. 612 (1938). Nine people were found in a rooming house. All except four lived there and in a closet of the hall on the top floor the police found a locked safe which, when opened, was found to contain weapons and ammunition, including four machine guns, one of which was the subject of the indictment. There was no additional evidence of any nature. The defendants had been convicted under subd. 1-a of section 1897 of the Penal Law, which creates a presumption of illegal possession by all the persons occupying a room, dwelling or vehicle where a machine gun is found. The Court of Appeals affirmed the conviction as to all nine defendants, without opinion.

In a situation somewhat analogous to this case the Court of Appeals in *People* v. *McCaleb*, 25 N.Y. 2d 394 (1969) upheld the validity of the presumption created by section 165.05, subd. 1, of the Penal Law, regarding the unauthorized use of a vehicle, to the effect that "[a] person who engages in any such conduct without the consent of the owner is presumed to know that he does not have such consent." The Court said:

> There is a "fair", "natural" and "rational" connection between the fact that a car is being used without permission of its owner, and the presumption that those in the car, driver and passengers alike, are aware they do not have permission. The likelihood of innocent use or occupation of a "stolen" vehicle is minimal, and in the rare instance could be easily explained, presenting no more than a light burden of going forward to make such explanation. Thus, the friend or companion may show, by creditable proof, that he innocently accepted on invita-

---

* Although a Federal District judge in *United States ex rel. Murphy* v. *Warden of Clinton Prison*, 29 F.S. 486 (1939) was critical of the *Murphy* decision as it pertained to defendants who did not live in the rooming house, he said with reference to section 1898-a creating a presumption against all its occupants from the presence of a pistol found in an automobile. ". . . that statute related to persons present in an automobile in which a pistol was also present. The difference between the confined space of an automobile and the four-story rooming house here involved under section 1897 subdivision 1-a is manifest." 29 F.S. at 494.

> tion to enter a vehicle which, unknown to him, had been previously taken wrongfully. In that event a heavy burden will have been placed on the prosecution to negative this rebuttal of the presumption, in order to sustain conviction based on proof beyond a reasonable doubt . . . But the unexplained use or presence in a stolen vehicle has a "sinister significance" sufficient to justify the presumption that the unauthorized use is with knowledge.

28 N.Y. 2d at 400-01.*

Appellant contends that since occupancy of a room implies more than mere presence, according to its definition in *People* v. *Terra, supra,* that by analogy the use of the word "occupying" used in section 1899, subdivision 3 of the Penal Law, with reference to the presence in an automobile of a firearm as constituting "presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found" implies more than mere presence in the automobile. The key words in section 1899, subdivision 3, are "at the time": "occupying such automobile at the time such weapon . . . is found." These key words are missing from subdivision 1 dealing with a room. Furthermore, the Court in *Terra* explicitly defined the word "occupying" restrictively "in its present context." 203 N.Y. at 335. It is thus apparent that there is no nexus created by the section governing this case between the occupant of a car and the car which requires that he have more than a transient connection with the car. A room is made for occupancy, an automobile for transportation. It is therefore readily understandable why the section dealing with a room in which a weapon is found refers

---

* See 28 ALR 3d 857 et seq. on "Reasonableness of Statutory Presumptions as to Acquisition or Possession of Guns."

to all persons occupying the room, whereas the section dealing with an automobile in which a weapon is found refers to all persons occupying the automobile *at the time* such a weapon is found. The definition of occupying a room by the Court of Appeals in *People* v. *Terra, supra,* as applicable to one who either resides in a room or uses it in the operation of a business or other venture cannot logically be applied to an automobile and it has not been so applied. For one thing a person does not reside in a car nor does a person ordinarily use a car in the conduct of a business except for the restricted purpose of transportation. There is thus more stability in the occupancy of a room than in the occupancy of a car. Rooms have two different categories—occupants and visitors; cars have only passengers. Rooms are made for storage, cars ordinarily not. For this reason, the section governing the presence in an automobile of a firearm creates a presumption made applicable to all persons occupying the automobile "*at the time*" the weapon is found. The occupants, invitees or passengers of a rented car may and do change kaleidoscopically. A car may be rented for a specific purpose which may be accomplished in the course of one day or less; a room does not change hands that often.* The rationale of the presumption in the case of a firearm found in a car as extending to all its occupants "at the time" should be and is no different from that applying to all the occupants of a room where a machine gun is found. All the occupants in either case are undoubtedly aware of its presence—a gun in the confines of a car, owned or rented, by all its transient occupants as much as a machine gun in a room by all

---

* Of course, the section applies to an owned car as well as to a rented car. A rented car was used in the instant case.

its regular occupants. A gun is placed in a car when it is ready to move into crime and so the presumption extends to all its occupants; a room however which stores a machine gun on a more permanent basis may not be ready for the use of the machine gun in crime when a mere visitor is in the apartment and so the presumption is restricted to its regular occupants. The evidence adduced in the instant case was that the car in which appellant was found was hired by one of the occupants of the car, Robert D'Ambra, on January 12 and continued on rent on the 13th, 14th and 15th. Since the automobile was neither a stolen automobile nor a public omnibus, it was a clear instance where the presumption allowed by the statute was applicable. If appellant's theory is correct, he would strike down the entire rationale of presumptions as made applicable to weapons found in automobiles. He would merely restrict it to the one individual who either owned or hired the car and bar its extension to that person's accomplices. He would nullify section 1899 of the Penal Law (continued under the revised Penal Law as section 265.15, subdivision 3).

The issue involved in all the state cases dealing with a presumption and in the federal cases mainly in the area of stills and drugs is whether there is a "rational connection between the facts proved and the ultimate fact presumed". *Tot* v. *United States*, 319 U.S. 463, 466 (1942). Thus in the *Tot* case, cited by appellant, the Court held invalid the presumption created by the Federal Firearms Act declaring that the possession of a firearm or ammunition by any person who has been convicted of a crime of violence or is a fugitive from justice shall be presumptive evidence that the firearm or ammunition was shipped, transported or received in interstate commerce, in order to give the

federal courts jurisdiction over the subject matter. It is quite clear, as the Court indicated, that there was nothing in reason or experience to support the presumption created by that statute. On the other hand, the Court of Appeals of the State of New York has sustained the constitutionality of the repealed section 1898-a, later replaced by section 1899 of the Penal Law, for the reason advanced in *People* v. *Terra, supra,* namely, that the rational connection is quite apparent between men engaged in the commission of a crime of violence and the possession of a firearm and ammunition in a car transporting them to the scene where a crime is to be committed. Men moving in a car towards the scene of a crime will not be fatuous enough to carry the firearms on their persons. Apprehension by the police while they are so engaged would pin a violation on the person carrying the weapon. In the hope of circumventing this possibility and evading all culpability, criminals have resorted to the placing of firearms in the body of the car rather than on their persons. The law has therefore taken cognizance of this reality by creating a presumption so that criminals who place a weapon in the body of a car on the way to the scene of a crime will not be able to outsmart the law and escape the punishment due them.

In a case in which the Supreme Court found the federal statutory presumption under the Internal Revenue Laws to be constitutional, *United States* v. *Gainey,* 380 U.S. 63 (1965), the statute provided that unexplained presence at the site of an illegal distillery business was sufficient to create a presumption that the accused was engaged in some manner in the carrying on of the business of a distiller. The rationale of the presumption created in that case,

which applies equally to the presumption created in the instant case, was cogently stated by the Court as follows:

> The legislative record shows that Congress enacted these provisions because of 'the practical impossibility of proving . . . actual participation in the illegal activities except by inference drawn from [the defendant's] presence when the illegal acts were committed.' . . .

380 U.S. at 65. The Supreme Court did not find the presumption of unexplained presence at the distillery an invasion of "the province of the judge's discretion." In this connection the Court said:

> The language permits the judge to submit a case to the jury on the basis of the accused's presence alone, and to this extent it constitutes congressional recognition that the fact of presence does have probative worth in the determination of guilt. But where the only evidence is of presence the statute does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment notwithstanding the verdict. And the Court of Appeals may still review the trial judge's denial of motions for a directed verdict or for a judgment n o v.

> The statute does not prevent the jury from being 'properly instructed on the standards for reasonable doubt.'

380 U.S. at 68.*

---

* Of course, as we have already indicated in our discussion of the *Tot* case, where there is no rational connection between the facts proved and the ultimate fact presumed the United States Supreme Court has found the Federal statutory presumption unconstitutional. In *United States* v. *Romano*, 382 U.S. 136 (1965) the Court found no rational connection in a provision of the Internal Revenue Act between an unexplained presence at an illegal still and the presumption created that the person found there was in "possession, custody and control" of the illegal still. This, as the Court pointed out, was a much narrower coverage than the presumption created in the *Gainey* case, *supra*, where the presumption found constitutional dealt with the person found at an illegal still having some connection with the business of a distiller which may be that of "suppliers, haulers, and a host of other functionaries." 380 U.S. at 67.

On the other hand, in *Bozza* v. *United States*, 330 U.S. 160 (1948), although the Court found no rational connection between the presence of petitioner at a still and the crime of "custody and possession" of the still, it nevertheless held that there was a rational connection between his transporting the finished product by automobile and the charge against him of aiding and abetting in the operation of the still, namely, the manufacture of alcohol. Finally, in *Leary* v. *United States*, 395 U.S. 6 (1969), the Supreme Court found no rational connection in the presumption created by a federal statute under the Marijuana Tax Act between the facts proven and the ultimate fact presumed. Thus, the mere fact that a defendant was apprehended with marijuana on his person was found not to establish a rational connection with the presumption created by statute that he had knowingly transported or facilitated the transportation and concealment of marijuana which had been illegally imported or brought into the United States. The Court found after an extensive investigation that the legislative record in connection with the Marijuana Tax Act failed to furnish any adequate foundation for the knowledge presumption created by the statute. The *Romano* and *Leary* cases have no bearing on the instant case where, as we have clearly shown, there is a rational connection between the facts proven and the ultimate fact presumed and where the Court of Appeals has sustained the constitutionality of the section in question.

It is respectfully submitted that this Court should not overturn lightly the well-entrenched principle of law of presumptions which has been enacted to cope with conspiratorial crime in the instance of weapons found in automobiles occupied by several people.

We answer some of appellant's other contentions or implications. Appellant cites *Turner* v. *United States*, 396 U.S. 398 (1970), for the implication that an empirical study should be undertaken to establish a nexus between the presence of guns in a car and the occupants of the car. His analogy, however, is quite far-fetched. In the *Turner* case the Federal statute created a presumption from the possession of heroin and cocaine that they had been illegally transported into the United States "unless the defendant explains the possession to the satisfaction of the jury." Of course, in such a situation it would be far-fetched to create such a presumption unless an empiric study was undertaken to establish that no domestic brand of the drug in question was produced. On the basis of incontrovertible evidence the Supreme Court concluded that no heroin was produced in the United States and that its source was exclusively foreign. On the other hand, the evidence pointed to the domestic production of some cocaine. On the basis of these empiric facts the Supreme Court sustained the conviction involving the possession of heroin but reversed the conviction insofar as the possession of cocaine was concerned.

This, however, is a far cry from the problem which confronts us. What possible empiric study could be undertaken regarding the nexus between occupancy of a car and possession of illegal firearms? It is simply a universally known fact of which the courts take judicial notice that criminals

adopt the *modus operandi* of placing weapons on the floor of a car transporting them to the scene of a crime. No single individual would seek to incur culpability to the exclusion of his accomplices by carrying the illegal weapon on his person. Appellant does not indicate how such an empiric study is to be conducted. Who is to be questioned? Are criminals to be questioned as to how many use this *modus operandi* and how many do not? Is the entire population to be canvassed as to how many ever found a gun in a car in which they were riding innocently? Even if *arguendo* some did, it would be of no utility to appellant, since the Court of Appeals in *People* v. *McCaleb, supra,* quoted with approval from McCormick on Evidence who analyzes the "well established criterion for evaluating the validity of a criminal statutory presumption," and states: "Doubtless, upon analysis, the courts which demand, 'rational connection' for the statutory presumption would be driven to decide that it is . . . probative sufficiency in the sense of something more than a fifty-fifty chance, that they are demanding." 25 N.Y. 2d at 403. This is an impossible, utterly fantastic, unscientific and absurd suggestion which, we are sure, does not merit further consideration.

Appellant contends that section 1899, subdivision 3, of the Penal Law violated his rights to remain silent, to trial by jury and to have the State meet its burden of proof. Appellant argues that the State has placed the burden on him and his co-defendants to purge themselves of their presumptive guilt and thereby their right to remain silent has been violated. The Court of Appeals in *People* v. *Terra, supra*, adequately rebutted this contention. See quotation from this case on p. 7, *supra.*

In further rebuttal of appellant's position, we cite the following cases: (1) *Wangrow* v. *United States*, 399 F. 2d 106, 118 (1968), cert. den. 393 U.S. 933 (1968), in which the trial court charged in connection with recently stolen property that "*unless satisfactorily explained possession* of recently stolen property is a fact from which they might infer that the possessor knew it was stolen." (Emphasis supplied). This was upheld on appeal.

(2) A thorough analysis of this issue is presented in *People* v. *Moro*, 23 N Y 2d 496 (1969), which involved the possession of a stolen car and in which the judge remarked that the defendant had unexplained possession of the stolen car. The objection was raised there, as here, that this was tantamount to an improper comment on defendant's failure to testify. This argument, however, was held untenable by the Court of Appeals, which stated as follows:

> The inference to be drawn against the defendant arises from the proven fact of his unexplained possession of the fruits of the crime. The inference continues only until some evidence is presented to explain this possession. It may certainly be overcome without the defendant's testimony and is not sustainable merely because the defendant has refused to take the stand. The existence of the inference in no way encroaches upon the well-established right of the defendant to refrain from testifying in his own behalf.
>
> * * * * *
>
> The Trial Judge showed great care when he referred to the unexplained possession of the automobile by the defendant. . . . Moreover, he twice informed the jury, during the trial, that section 393 of the Code of Criminal Procedure precluded them

> from drawing any inferences against the defendant because of his failure to testify. Under such circumstances, it is apparent that a defendant's rights are unimpaired by the fact that an inference may arise from his unexplained possession of the fruits of a crime. (See *Wangrow* v. *United States*, 399 F. 2d 106, 118, cert. den. 393 U.S. 933.)

It should be noted that the trial judge in this case too showed great care in instructing the jury that it was not to draw any inferences from appellant's failure to testify. The Court in this connection said as follows:

> Now, this presumption, however, is rebuttable, and not conclusive; that is, it is a presumption which may be explained or refuted, if sufficient believable evidence is produced at the trial. Bear in mind the statute does not make it obligatory upon a defendant to take the stand and explain his lack of knowledge of the presence of the weapon in the car in which he was one of the occupants; because, as was indicated to you at the time of your selection, Section 393 of our Code of Criminal Procedure provides:
>
> 'A defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.'
>
> So you must examine all of the evidence in the case, including the cross-examination of the People's witnesses by defense counsel and any and all evidence which may be favorable to the defendants, to determine from all the circumstances of the case whether or not the presumption provided for by section 1899 has been rebutted or explained so as to raise a reasonable doubt as to the guilt of a defendant or the defendants. In other words, in your deliberations, you should take into consideration not only the presumption of illegal possession created by statute and

any other evidence submitted by the People in furtherance of that presumption, but you will consider all the evidence which in your opinion tends to rebut the presumption and to exculpate the defendants or any of them (160).*

It is respectfully submitted that none of appellant's constitutional rights have been violated by a salutary presumption of long standing in the law enacted to cope with a festering crime problem.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
September 19, 1971

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

J. MITCHELL ROSENBERG
Assistant District Attorney
of Counsel

---

* The irrelevancy of cases cited by appellant is clearly manifested in *Manley* v. *Georgia*, 279 U.S. 1 (1929), in which the Supreme Court held that a presumption of guilt on the part of bank directors cannot reasonably be drawn from mere inability of the bank to pay demand deposits and other debts as they mature. The relevance of this case to the instant case eludes the writer.

APPENDIX A

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS MUNGO AND WALTER JOHNSON, Appellants.

Submitted December 8, 1970; decided January 13, 1971.

Crimes — felonious possession of weapons — probable cause—defendants were convicted of felonious possession of weapons, based upon testimony that, after police officer received radio message that three perpetrators of truck hi-jacking had been observed in automobile of specified description and bearing specified license number, he observed described vehicle, stopped it, placed occupants, defendants and another, under arrest for hi-jacking, frisked them and searched vehicle, finding one weapon under driver's seat and another weapon under passenger seat—contentions by one defendant that there had not been probable cause for his arrest, that scope of search rendered it unreasonable, and that there was inadequate proof to establish that weapons introduced into evidence were those seized—contentions by other defendant that, in charging statutory provision making presence of firearm in automobile presumptive evidence of its possession by all persons occupying vehicle, trial court improperly permitted jury to presume his possession from his mere presence in vehicle, that inference of possession from proof of occupany was irrational, and that statutory provision violated his rights to remain silent, to trial by jury and to have People required to establish his guilt beyond reasonable doubt—judgments of conviction were properly affirmed.

People v. *Mungo*, 34 A D 2d 616, affirmed.

People v. *Johnson*, 34 A D 2d 616, affirmed.

Appendix A

APPEALS, by permission of the Chief Judge of the Court of Appeals in the case of defendant Johnson and by permission of an Associate Judge of the Court of Appeals in the case of defendant Mungo, from judgments of the Appellant Division of the Supreme Court in the Second Judicial Department, entered March 13, 1970, affirming judgments of the Supreme Court (VINCENT D. DAMIANI, J.), rendered in Kings County upon verdicts which convicted defendants of possession of weapons and dangerous instruments and appliances, as a felony (two counts). The indictment charged defendants and one Robert D'Ambra with unlawfully possessing a revolver and a pistol on or about January 14, 1967. At a hearing upon a defense motion to suppress, subsequently denied, and at the trial, a police officer testified that on that date he had received a radio message that three perpetrators of a truck hi-jacking had been observed leaving the scene in a blue 1966 Plymouth with a specified license number; that, two or three miles from his location when he received the message, he observed the described vehicle, stopped it and placed the occupants defendants and D'Ambra, under arrest for hi-jacking; that he frisked them and searched the vehicle, finding the revolver under the driver's seat, where defendant Mungo had been, and the pistol under the passenger seat, where defendant Johnson had been, and that, when they reached the police station, he arrested them for unlawful possession of the weapons. The officer's testimony as to the arrest, search and removal of the weapons from the vehicle was corroborated by a fellow officer and his testimony as to the contents of the radio messages was corroborated by an officer attached to the communications unit. There was further evidence that, in violation of police department pro-

cedure, the arresting officer had failed to mark his initials on the weapons which he had secured with the police property clerk. The court which presided at the hearing found that the officer had probable cause to believe that a felony had been committed and that defendants had committed it; that, accordingly, their arrest was justified, and that the search of the vehicle was lawful as incidental thereto. In the Court of Appeals defendant Mungo contended that there had not been probable cause for his arrest; that the scope of the search rendered it unreasonable, and that there was inadequate proof to establish that the weapons introduced into evidence at the trial were those which had been seized from the automobile. Defendant Johnson contended that, in charging the statutory provision making the presence of a firearm in an automobile presumptive evidence of its possession by all persons occupying the vehicle at the time the weapon was found (former Penal Law, § 1899, subd. 3; revised Penal Law, § 265.15, subd. 3), the trial court improperly permitted the jury to presume his possession of the weapons from his mere presence in the vehicle; that the inference of possession from proof of occupany was irrational, and that the statutory provision violated his rights to remain silent, to a trial by jury and to have the People required to establish his guilt beyond a reasonable doubt.

Joseph Slavin for Thomas Mungo, appellant.

E. David Erwin and *Milton Adler* for Walter Johnson, appellant.

Eugene Gold, District Attorney (*J. Mitchell Rosenberg* of counsel), for respondent.

Judgments affirmed; no opinion.

Concur: Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON.